FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Delta Air Lines, Inc. (hereinafter called "Delta"), the Petitioner below, prays that this Court will deny the Petition for Writ of Certiorari filed in No. 492 by the Solicitor General, on behalf of the Civil Aeronautics Board (hereinafter both referred to as the "Board" or the "CAB"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in *Delta Air Lines, Inc.*, v. *Civil Aeronautics Board* (2d Cir. 1960), 280 F. 2d 43.[1]

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[1] Citations to the Opinion below will be to Appendix A of the Petition in No. 492, *e.g.*, "(App. A. pp. 15-24)." References to material in the printed Joint Appendices will be by page number thereof, preceded either by the symbol "J.A." or by the symbol "Add'l J.A." The symbol "J.A." refers to the white-covered, three-volume Joint Appendix filed in case No. 25,422, etc., in the Court below, and by stipulation made part of the record in this case. The symbol, "Add'l J.A." refers to the blue-covered, single-volume Additional Joint Appendix filed with the Court below in the instant case No. 25,852.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the CAB, after it has entered an order permitting a certificate for public convenience and necessity to become effective under Section 401(f)[1] of the Federal Aviation Act,[2] which Section provides that a certificate shall be effective "from the date specified therein and shall continue in effect until suspended or revoked as" thereafter provided in the Statute, still has power to alter such a certificate by acting on timely petitions for reconsideration following the CAB-specified certificate effective date, without resort to the procedures specifically provided in the Statute for the modification of effective certificates.

COUNTERSTATEMENT OF THE FACTS

This case involves an administrative proceeding before the CAB known as the *Great Lakes-Southeast Service Case*. That proceeding was concerned with the air service needs of an area extending between the Great Lakes and Florida. Only applications by so-called trunkline carriers were consolidated, as noted in the CAB's Petition (p. 4), but no restrictions were placed upon the trial of those applications which in any way limited the right of the applicants to seek both long-haul rights and also rights to provide more short-haul types of service between intermediate cities in the area under consideration (CAB Orders E-9734, J.A. 78a *et seq.*, and E-10043, J.A. 111a *et seq.*).

In its decision (CAB Order E-13024, September 30, 1958, J.A. 1313a *et seq.*), the CAB added six cities to Delta's

[1] 72 Stat. 754, 49 U.S.C. 1371(f).

[2] 72 Stat. 731, 49 U.S.C. 1301. Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act (52 Stat. 973, 49 U.S.C. 401), was supplanted by the Federal Aviation Act. The provisions of the former Act here involved were re-enacted without change, and there is admittedly no issue stemming from the supplantation of the Civil Aeronautics Act.

existing Route 54, which prior to that time served Chicago and Miami via certain intermediate points, but by-passed Indianapolis. The addition of three of those cities, Dayton, Louisville, and Indianapolis,[1] permitted Delta for the first time to offer service between them and cities in the Southeast and Florida, and also between them and certain other, more nearby points already served by Route 54. Since Indianapolis already was an authorized intermediate point on another Delta Route—Route 8—between New Orleans and Detroit, inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved (E-13024, J.A. 1323a and 1346a-1347a), of permitting Delta to serve cities on *both* of these routes on the same flights, provided that the flights stopped at the "route junction point" of Indianapolis.

Although as the CAB's Petition states (p. 4), the agency imposed restrictions on a number of new certifications granted to other applicants in order to protect existing local service carrier operations, *none* of these restrictions were imposed upon the certifications made to Delta.[2] No restrictions of any kind were imposed upon Delta's new Dayton, Louisville and Indianapolis authorities.

By this CAB order of September 30, 1958, the new Delta certificate incorporating the above-described additional authority was to become effective sixty days thereafter, on November 29, with the proviso that *prior* thereto the Board might extend that effective date upon its own

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[1] The addition to Delta's authority of the other three cities, Columbus, Toledo and Detroit, which permitted Delta for the first time to offer service between those cities and the Southeast, has no bearing on the question presented in this case.

[2] The restrictions which were imposed upon Delta (E-13024, J.A. 1355a-1356a), were all imposed for other reasons not here pertinent.

initiative or in recognition of a timely-filed petition for reconsideration of the September 30 order (J.A. 1384a). The certificates of other carriers which had received new authorizations in the *Great Lakes-Southeast Case* had the same effective date and were made subject to the same proviso (J.A. 1379a, 1388a, 1394a and 1400a).

Petitions for reconsideration were in fact filed by various parties including Lake Central Airlines, Inc. (hereinafter "Lake Central"), and Piedmont Aviation, Inc. (hereinafter "Piedmont"), two local service carriers which were intervenors in the agency proceeding. These two petitions sought, *inter alia,* to have restrictions imposed on Delta's service between ten pairs of cities which, with the addition of Indianapolis, Louisville and Dayton to Route 54, Delta was enabled to serve *without* restriction under the certificate authorized by the CAB's September 30 decision.

Lake Central's petition to the CAB for reconsideration also requested a stay of the effective date of Delta's certificate (then set for November 29, 1958) if necessary in order to allow CAB action on the petition before the certificate went into effect (Add'l J.A. 1591a-1592a). On November 28, 1958, the CAB issued Order E-13211 (J.A. 1469a *et seq.*) which, with one exception, refused to stay the effective date of any new certificate, thus denying the Lake Central plea for stay of the Delta certificate. The CAB assigned two interrelated reasons for its refusal to grant the requested stays. First, after reviewing the various petitions for reconsideration, the CAB found that they did not make sufficient showing of probable legal error or abuse of discretior to justify a stay, except for one exception referred to above. Second, the CAB stated that it wished to have the new services inaugurated in time for the peak period of winter travel (J.A. 1470a-1471a). As the Petition herein notes, the CAB's opinion closed with the statement that Order E-13211 was not a disposi-

tion of the several petitions for reconsideration on their merits (J.A. 1495a-1496a).

The one exception where a stay was granted, involved new authority which had been awarded to Eastern Air Lines. Piedmont, in its petition for reconsideration (in addition to seeking imposition of restrictions upon Delta) also sought to prevent the extension of Eastern's Route 6 from Charleston, West Va., to Chicago. In its opinion accompanying Order E-13211, the CAB found that Piedmont's objection to this additional *Eastern* authorization *did* raise serious questions; and it was for that reason that the Eastern certificate's effective date was stayed until further action could be taken by the Board (J.A. 1494a).

For reasons not relevant here, Delta's new certificate actually became effective on December 5, 1958, rather than upon November 29, 1958 (see Add'l J.A. 1593a-1595a). On January 1, 1959, pursuant to schedules filed with the CAB, Delta inaugurated service under the new certificate between Chicago and Indianapolis, with the flights continuing beyond Indianapolis southward to Evansville, Indiana, a city which Delta was authorized to serve on its previous-established Route 8, and shortly thereafter also inaugurated service between Louisville and Indianapolis—services which would not have been permitted under the restrictions which had been requested by Lake Central and Piedmont.[1]

On May 7, 1959, over five months after Delta's new, unrestricted authority became fully effective, and four months after Delta inaugurated new services pursuant to schedules filed with the CAB, the agency issued the order

[1] By informal agreement with the CAB, Delta has refrained from inaugurating additional service in these ten markets (except such as would be permitted even if the restrictions were imposed), pending resolution of this proceeding.

of which complaint was made in the Court below (E-13835, J.A. 1509a *et seq.*). This order purported to constitute the CAB's formal disposition of the various petitions for reconsideration of the September 30 decision which had been left pending when the certificate was allowed to take effect. The order did in fact modify the former decision, one modification being the imposition upon Delta of the restrictions requested by Lake Central and Piedmont, so that a Delta flight serving any of one of the ten pairs of cities mentioned in those carriers' petitions was thereafter required to originate at Atlanta or at a point on Route 54 south thereof. One effect of the restrictions was to render illegal the services which Delta already had inaugurated in good faith between Evansville and Chicago via Indianapolis and between Indianapolis and Louisville.

Upon Petition by Delta, the Court below stayed the effectiveness of Order E-13835 and, in its later decision, held that the CAB was without power to impose the additional restrictions upon Delta's certificate by means of reconsideration after the certificate had become effective.

ARGUMENT

The CAB presents what appear to be three different grounds for seeking review by this Court, namely, (a) that the decision below gave an erroneous construction to the language of Sections 401(f)[1] and 401(g)[2] of the Federal Aviation Act (Petition, pp. 7, 8-10); (b) that the decision below conflicts with prior decisions of this Court and of other Circuits (Petition, pp. 9-10); and (c) that the decision below "cannot fail to impair the administrative process" (Petition, pp. 7, 8, 11-12). Delta will show that not one of these grounds contains any substance which would justify a review of the Second Circuit's decision.

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[1] 72 Stat. 754, 49 U.S.C. 1371(f).

[2] 72 Stat. 754, 49 U.S.C. 1371(g).

It will be shown that the decision below is in full accord with prior decisions by this Court and, indeed, with a long line of court and administrative agency decisions; that the Court's construction of the pertinent Federal Aviation Act provisions was eminently correct; and that the decision below in no manner will impair the administrative process. The CAB just disagrees with the conclusion of the Court below; but such disagreement forms no basis for issuance of a Writ of Certiorari. As this Court said in *Magnum Import Company* v. *De Spoturno Coty*, 262 U.S. 159, 163 (1923);

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ . . ." (Emphasis added).[1]

I. The Decision Below Properly Construed and Applied the Language of the Federal Aviation Act.

When reduced to its essence, the decision below is merely this: Because the CAB is a creature of Congress,

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[1] Although the *Magnum* case was decided before the amendments made by the Judiciary Act of 1925, the force of the above-quoted language has not been vitiated. The essence of the Act of 1925 was curtailment of this Court's appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions (*Ex Parte Republic of Peru*, 318 U.S. 578, 600 [1943]). Furthermore, the quoted language from *Magnum* has been cited with approval within just the past few years, *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

its "powers are purely statutory," *Seatrain Lines, Inc.* v. *United States*,[1] and it therefore can act only ". . . as specifically authorized by Congress," *United States* v. *Seatrain Lines*.[2] As the Court below recognized (App. A to CAB Petition, p. 20), the *Seatrain* case involved a situation analogous to the one involved here. The decision below, therefore, merely applied well-settled law to the clear and unambiguous language of Sections 401(f) and 401(g) of the Federal Aviation Act. It rejects, as did *Seatrain*, an agency attempt to read into its organic statute a power which Congress chose not to grant explicitly—a power which would create an *implied* exception to a limitation which Congress clearly *did* impose.

The limitation which Congress imposed is upon the CAB's power to modify certificates once they are granted. Congress specified in Section 401(f) that:

> "Each certificate shall be effective *from the date specified therein*, and *shall continue in effect* until suspended or revoked as *hereinafter* provided . . ." (Emphasis added)

And as the Court below held—a holding which the CAB does not contest—the next succeeding Section, Section 401(g), is the only provision in the Act which expressly deals with the modification of effective certificates (App. A, p. 20). Section 401(g) admittedly was not followed here.

The implied exception to the unqualified[3] language of

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[1] 64 F. Supp. 156, 160 (D.C. Del. 1946), *aff'd.*, *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947).

[2] 329 U.S. 424, *supra*, at 433.

[3] Although Section 401(f) does state three exceptions to its rule as to the inviolability of certificates after the effective dates specified therein, none of them are applicable here: a certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the

these two Sections for which the CAB contends, would allow "reconsideration" of effective certificates where, on the date a certificate is made effective, the CAB has not yet disposed of previously filed petitions for reconsideration of the underlying agency decision.

As will be seen, there is no basis upon which any such exception can be founded. It might first be noted, however, that there is no merit to the CAB's position that the Second Circuit decision will render difficult the reconsideration of CAB route case decisions. The CAB's argument constitutes an attempt to amend the Statute on the basis of administrative expediency—an attempt to secure more time for the reconsideration process whether or not a certificate has gone into effect. Affirmance of such a position, of course would destroy the chief aim of Congress in providing for certificates in the first place—to give the carriers route security (*Lea*, 83 Cong. Rec. 6407 [1938]). In any event, the statute as *now* written gives the CAB all the time needed to reconsider its decisions without impairing the value of certificates once made effective.

Thus, the CAB now has three courses of action open to it, each of which would be in full accord with the law: (a) to act on petitions for reconsideration within the sixty-day grace period before certificate effectiveness for which new certificates invariably provide (see, *e.g.*, J.A. 1379a, 1384a, 1388a, 1394a, and 1400a); (b) to allow for a lo[illegible]er grace period than sixty days in new certificates in any instance where the complexity of the proceeding indicates that reconsideration might involve protracted consideration of difficult issues; or (c) to further extend (stay)

Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within 90 days of authorization, the Board upon notice and hearing may revoke the unused authority (see App. A to CAB Petition, p. 20).

the effective date of a new certificate if, as the end of the originally-specified grace period is approached, it appears that additional time will be needed for reconsideration. Any one of these steps will provide for full completion of the administrative process *without* departure from the Statute as now written and without violation of the certificate holder's rights to due process.

Furthermore, none of these three courses of action will unduly impede the administrative process. This is evident from the fact, to be explained below, that heretofore the CAB *has* consistently followed steps (a) and (c) as outlined above, with no discernible adverse effect upon its discharge of the responsibilities imposed upon it by Congress.[1] This case, therefore, does not have to be approached, and it was not approached by the Court below, on the basis that denial of the position urged now by the CAB will curtail administrative freedom.

The CAB is unable to point to any specific language in Section 401(f), Section 401(g), or elsewhere in the Statute which states the implied exception for which it contends—or, indeed, which even mentions reconsideration of certificates under any circumstance. The Board does point to the language underscored in the following quotation from this Court's opinion in the *Seatrain* case, *supra*, 329 U.S. 424 at 432-433 (CAB's Petition, p. 11):

> ". . . The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress . . ." (Emphasis added).

The underscored language, however, is inapplicable in a proceeding under the Federal Aviation Act.

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[1] For a discussion of the fact that the law as applied by the Court below will not mean frustration of the administrative process, see *Ryan, Revocation of an Airline Certificate*, 15 Journal of Air Law and Commerce, pp. 377-389, at 389 (1948). The author is a former chairman of the Civil Aeronautics Board.

The quoted language was concerned with a certificate issued under the Water Carrier Act.[1] Contrary to the Federal Aviation Act, that Act does not specify the date upon which a certificate shall become effective, nor does it lay down a procedure for modifying a certificate once issued (see *United States* v. *Seatrain Lines, Inc., supra,* 329 U.S. at 430). Moreover—again contrary to the Federal Aviation Act—the Water Carrier Act *does* contain elaborate provisions with respect to rehearing, reargument, and reconsideration of agency decisions, orders, and requirements.[2] These two factors account for the Court's reference to the passing of "the time fixed for rehearing."

The Board also tries to find support for its position in Sections 204(a) and 1005(d) of the Federal Aviation Act.[3] These two Sections, however (which are set forth in the Appendix to this Brief), merely allow the Board, except as otherwise provided in the Statute, to "amend", "modify", or "suspend" its "*orders.*" Because this broad and *general* language is the only thing in the Federal Aviation Act which even approaches provision for reconsideration of CAB actions, it is clear that it cannot modify the *specific* language of Sections 401(f) and 401(g) which, unlike the Water Carrier Act provisions, *do* prescribe with precision when a certificate shall become effective and do carefully outline the procedure thereafter to be followed in the event that it is desired to consider possible revision of an effective certificate.

Moreover, the *Seatrain* case, upon which the Board itself relies, makes it clear that such broad language as that

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[1] 54 Stat. 929 *et seq.*, 49 U.S.C. 901 *et seq.*

[2] Section 316(a) of that Act, 54 Stat. 946, 49 U.S.C. 916(a) incorporating Section 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6).

[3] 72 Stat. 743, 49 U.S.C. 1324(a), and 72 Stat. 794, 49 U.S.C. 1485(d), respectively.

contained in Sections 204(a) and 1005(d), referring merely to "orders," cannot be used to create a power to reconsider effective *certificates*. The *Seatrain* case rejected a similar argument. In that case, the Interstate Commerce Commission relied upon substantially identical language in the Water Carrier Act in attempting to create for itself a power to modify certificates which Congress had not specifically granted. This Court held (329 U.S. at 432):

> "Nor do we think that the Commission's ruling was justified by the language of Sec. 315(c), 49 USCA Sec. 915(c), 10A FCA title 49, Sec. 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' *That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act.* Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' . . . It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. *But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding . . .*" (Emphasis added).

As noted earlier, this Court went on to hold that *certificates* can be modified *only* in the manner *specifically* authorized by Congress.[1]

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[1] Application of this Court's interpretation in the *Seatrain* case of the Interstate Commerce Act provisions to the similar language of Section 1005(d) of the Federal Aviation Act is reinforced by

Thus, the *Seatrain Case,* rather than providing support for the CAB's present attempt to escape from its statutory limitations through the creation of an implied exception to Section 401(f), clearly supports the contrary ruling of the Court below.

The *Seatrain Case* was not the first time, nor the last, that in analogous situations it has been decreed that an agency must follow procedures specifically prescribed by Congress, and not attempt by inference to create for itself other powers not expressly conferred. Thus, in *Seatrain,* this Court cited an earlier decision by the Interstate Commerce Commission under the language of Section 212(a) of the Motor Carrier Act,[1] which Section is substantially similar in content to Section 401(f) and 401(g) of the Federal Aviation Act (Section 212[a] of the Motor Carrier Act is set out in full in the Appendix hereto). As this Court put it:

> ". . . in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in Section 212 (a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Re Smith Bros. Revocation of Order;* 33 MCC (F) 465" (329 U.S. 429, at 430-431).

As the Interstate Commerce Commission had put it in the *Smith Bros.* case itself:

> ". . . We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all

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the very next Section of the latter Statute, Section 1005(e), 72 Stat. 794, 49 U.S.C. 1485(e). In that Section Congress specifically mentioned "certificates" separately from "orders", implying clearly that the two terms cannot be read as having the same meaning. Section 1005(d) mentions only "orders."

[1] 49 Stat. 555, 49 U.S.C. 312(a).

> controversy is determined, but *once a certificate, duly and regularly issued, becomes effective our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated but *the certificate marks the end of the proceeding*, just as the entry of a final judgment or decree marks the end of a court proceeding . . ." (Emphasis Added).

In exact accord, see *Hergott* v. *Nebraska State Ry. Commission*, 15 N.W. 2d 418, (Neb., 1944).

One of the more important decisions decided since the *Seatrain* case is *Watson Bros. Transportation Company* v. *United States*, 132 F. Supp. 905 (D. Neb. 1955), affirmed by this Court, 350 U.S. 927 (1956). A three-judge District Court in that case ruled, under those provisions of the Motor Carrier Act which are similar to Sections 401(f) and 401(g) of the Federal Aviation Act, that:

> ". . . The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . .
>
> ". . . Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.
>
> ". . . the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued" (132 F. Supp. 905 at 909).

In the *Watson* case there was a deliberate attempt by the Interstate Commerce Commission to implement a change of heart through modification, without notice and hearing, of a previously-effective certificate.

Except for the fact that no petition for reconsideration had been filed (the Commission acted on its own motion) the *Watson* case is on all fours with this one. As the Court below found (App. A, to Petition herein, p. 21) findings which are not contested by the CAB—in this

case there is no suggestion of inadvertent error, no suggestion that at the time it was put into effect Delta's certificate mistakenly contained greater authority than the CAB intended to confer. The Court further found it to be "affirmatively clear" that when the CAB refused, just prior to the certificate's effective date, to extend that date as other parties had requested in order to permit reconsideration, the CAB was fully aware of the arguments which subsequently led it on May 7, 1959 (five months after the certificate became effective, and four months after Delta inaugurated service under that certificate) to impose the restrictions of which Delta complains.

The fact is, therefore, that in the interim the CAB changed its policy, an arbitrary—or at least unilateral—administrative determination which did not and cannot invest the CAB with authority to modify an effective certificate without adherence to Section 401(f) and 401(g) procedures, *United States* v. *Watson Bros. Transportation Company, Inc., supra; American Trucking Associations, Inc. et al.* v. *Frisco Transportation Company,* 358 U.S. 133, 146 (1958). Clearly, the Board's actions were all taken deliberately, and, like the Interstate Commerce Commission action involved in *Watson,* constitute an invalid attempt, contrary to specific statutory limitations, to change a certificate duly issued.

The CAB makes the sweeping statement to this Court that the agency "has previously modified, upon reconsideration, certificates which it had allowed to become effective" (Petition, p. 10, footnote 7). It then purports to cite five "examples" of this alleged past course of conduct (*ibid*). The fact is, however, that these five "examples" are the only previous instances known to Delta out of the hundreds and hundreds of cases decided by the CAB where such action even was attempted. And, as the Court below found (App. A to the CAB Petition, p. 23, footnote 11), even of those five "examples," one is not in point.

Furthermore, in none of the remaining four instances did the affected carrier raise any objection to the CAB's attempted modification.

The four uncontested "examples" constitute only scattered *exceptions* to a *consistent* and *contrary* course of conduct by the CAB ever since 1948—a course of conduct which clearly has constituted agency recognition of its *lack* of power to reconsider an effective certificate. In its *Kansas City-Memphis-Florida Case*, 9 C.A.B. 401 (1948), the CAB said:

> ". . . We have grave doubt, however, as to our possession of such power . . ." (9 C.A.B. 401 at 408-409).

In view of this doubt, the agency went on to announce that:

> ". . . in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case" (*ibid.*).

Since rendering this decision, the CAB consistently has made new certificates effective sufficiently long after the decision date, usually sixty days (as in this case), to permit reconsideration if requested, and has conditioned even such an advance effective date upon a power reserved unto itself to extend the date further if necessary to allow additional study of petitions for reconsideration. Moreover, in cases decided before this one, the CAB repeatedly has used this power to postpone the effective date of certificates during reconsideration. (The cases are collected at pages 29-32 of Delta's Brief, and at pages 9-12 of Delta's Reply Brief, to the Court below.)

Indeed, as the Second Circuit found (App. A to CAB's Petition pp. 22-23), the CAB even has represented to at least one court that it has been the agency's practice here-

tofore to stay a certificate's effective date if necessary to give it time to consider the merits of petitions for reconsideration, *Southwest Airways* v. *Civil Aeronautics Board* (9th Cir. 1952), 196 F. 2d 937, 938. Moreover, just the week before last, the CAB issued an order in another proceeding (the *Great Lakes Local Service Investigation*, CAB Docket 4251), in which the CAB again recognized that unless it stays the effective date of certificates until it can dispose of petitions for reconsideration, it will lose the power to do so. Except for the actual ordering language staying the effectiveness of the new certificates there involved, that order in its entirety reads as follows:

> "Various petitions for reconsideration of the Board's decision in the above-entitled proceeding (Order E-15695, dated August 25, 1960) have been filed and it appears that the Board's consideration of these petitions will not be completed until after November 8, 1960, the date presently fixed for making effective the amended certificates issued as part of the Board's decision herein. In order to preserve the status quo until the Board has had adequate opportunity to dispose of the aforementioned petitions, we find that it is in the public interest to stay the effectiveness of the certificates in question" (Order E-15995, November 4, 1960).

The CAB's action in the instant proceeding was an arbitrary departure from its normal practice.

In its Petition to this Court (pp. 10-11), the CAB also says that its order refusing to stay the effective date of Delta's certificate,[1] "left open the question of modification" raised by the petitions of others for reconsideration. This apparently is a contention by the CAB now that it reserved the power to modify Delta's certificate. It has tucked a statement to this effect into footnote six at page nine of the Petition, referring to an alleged "express

[1] Order E-13211, (J.A. 1469a).

reservation" in the order denying stay of power to modify the certificate. Similarly, in the Question Presented at page two of the Petition, the Board says that this situation is one "where the Board's order expressly reserved the right to make such modification."

This is the *first* time that the agency has made any specific claim that it actually reserved the power to "reconsider" Delta's final and effective certificate. Compare the Question Presented by the companion Petition for Writ of Certiorari in No. 493. The Board apparently relies upon the following statement from the decision below (App. A to CAB Petition, p. 24):

> ". . . Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."

The quoted language, even for purposes of argument, does not constitute recognition of any actual reservation of power. It merely says that the CAB "put Delta on notice" that it "purported" to reserve such power. *The mere fact that the CAB served notice, however, that it intended to act in violation of the statutory scheme did not give it power to do so.*

Even if the Board had made an actual reservation of power in the certificate itself, the decision below would remain correct. The Board cannot by a voluntary *ex parte* action, create powers for itself which Congress has withheld; it cannot, by a "reservation," empower itself to ignore the provisions of Section 401(f) and 401(g). In *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), this Court sanctioned use of an express reservation which had been written into a Motor Carrier certificate. The purpose of that reservation was to allow the Interstate Commerce Commission to tighten

up original restrictions, if necessary, which were designed to limit the carrier to services auxiliary to the railroad operations conducted by its parent company. The Court noted that actual changes or revocations may be made in motor carrier certificates only under Section 212 of the Motor Carrier Act (340 U.S. 419 at 426), a section which, as seen above, is substantially similar to Sections 401(f) and 401(g) of the Federal Aviation Act. In passing upon the Commission's action, the Court stated, therefore, that even

> ". . . such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will. That would violate Sec. 212, allowing suspension, change or revocation only for the certificate holder's willful failure to comply with the Act or lawful orders or regulations of the Commission . . ." (340 U.S. 419 at 435).

In summary, as the foregoing shows, the Court below properly construed the provisions of the Federal Aviation Act, in conformity with a long line of judicial and administrative decisions. The CAB just disagrees with the outcome; but such disagreement is not a sufficient reason for burdening this Court with a review of the Second Circuit's action, *Magnum Import Company* v. *De Spoturno Coty*, *supra*.

II. The Decision Below Does Not Conflict With Prior Decisions of this Court or of Other Circuits.

The foregoing also shows that the CAB's charge of inconsistency between the decision below and the prior decisions of this Court in the *Seatrain*, *Watson Bros.*, and *American Trucking Association* cases, all *supra* (Petition p. 10), clearly is without foundation.

Nor does the decision conflict with any opinion of another Court of Appeals. In point of fact, it could not do so because this is the first time that the question here

involved has been raised and specifically decided in a Court case involving the Federal Aviation Act or its predecessor, the Civil Aeronautics Act.[1] While a somewhat similar question, among many unrelated questions, was raised in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1958), 259 F. 2d 808, cited at page nine of the CAB's Petition, that case did not involve the precise same issue raised here concerning diminution of the complainant's effective authority on reconsideration. More important, perhaps, the Court in *Frontier* did not purport to rule upon any related issue (and thus did *not* "reject" the position properly adopted by the Court below in this case, as alleged at page nine of the CAB's Petition). In this respect the Court in *Frontier* merely decided a question as to the CAB's power to act upon petitions for reconsideration—and even then only with the Court's approval—after a petition for *judicial review* had been filed.

As the Court below found (App. A to CAB Petition, p. 23), the only other case cited by the CAB as allegedly being inconsistent with that Court's decision, *Western Air Lines, Inc.* v. *Civil Aeronautics Board* (9th Cir. 1952), 194 F. 2d 211 (Petition, pp. 9-10), "involved a Board procedure entirely different from that in the present case."

Clearly, then, there is no inconsistency between the decision below and that rendered by any other Court of Appeals. To the contrary, as the Court below pointed out (and as shown hereinabove) the decision accords fully with a long line of prior cases both in this Court and in the various Courts of Appeals.

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[1] 52 Stat. 933, 49 U.S.C. 401.

III. The Decision Below in No Manner Will Impair the Administrative Process.

The Board's charge that the decision below will impair its administrative responsibilities is not an argument properly directed to this Court.

As long as the decision comports with the Statute and with the decided case law, as it does, any policy problems thereby created for the Board are for Congress to resolve. This Court heretofore has rejected a CAB argument that it should be allowed to depart from its governing statute for reasons of policy, *Delta Air Lines, Inc.* v. *Summerfield,* 347 U.S. 74 (1954). The Court told the Board that there, as here, it had misconceived its remedies:

> "*The Board makes an extended argument of policy* against that position in elaboration of the reasons it advanced for not offsetting the excess earnings from domestic operations against the international subsidy rate. . . . *It maintains that maximum operating efficiency on the part of air carriers and the development of air transportation—prominent objectives of the Act . . . —will be better served* by setting subsidy rates on a divisional rather than on a system basis. *This may be so. But that is a matter of policy for Congress to decide.* As we read Sec. 406(b), Congress adopted in the present act a rate formula based on 'the need' of the carrier as measured by its entire operations, even when a rate was being fixed for a class of service" (347 U.S. at 79-80; emphasis added).

So it is here. Congress has prescribed a definite procedure for changing an effective certificate, whether the change is to be revocation or modification (App. A to CAB Petition, p. 21). It did so because either type of change could seriously affect valuable operating and property rights.

Not only are the Board's policy appeals thus irrelevant, but in various respects they are incorrect. The Board

complains, for example, that a consequence of the decision below may be "unduly hasty decision on requests for reconsideration raising complex problems" (Petition, p. 11). That is not true.

As mentioned herein, earlier, the CAB invariably makes new certificates effective 60 days after the date of the granting decision, in order to allow sufficient time for reconsideration (see, for example, J.A. 1379a, 1384a, 1394a, and 1400a). The CAB requires petitions for such reconsideration to be filed within 20 days after the decision, and answers thereto 10 days later, leaving the CAB 30 days during which to act upon those petitions without worrying about the original effective date.[1]

If a proceeding should be so complex as to indicate that the resulting thirty days will be insufficient, the CAB can always write a longer grace period than sixty days into a new certificate when it is granted. If this is not done, and the thirty-day period actually proves to be inadequate in any particular case, all the Board has to do—as this Answer has shown it has done time after time in the past—is to extend the effective date of new certificates until it finishes its job of reconsideration.[2]

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[1] CAB Rule 37(a), 14 C.F.R. 302.37. At the time the agency case here involved was decided, 30 days were allowed for filing petitions for reconsideration. Thereafter, CAB Rule 37 was amended (PR-34, adopted by CAB on February 11, 1959), so as to reduce the time for filing to 20 days, in order to give the Board and its staff more time ". . . when some action by the Board is necessary or desirable before any new or amended certificates take effect" (*ibid*).

[2] Such action also would resolve all problems raised by the CAB in footnote eight at page eleven of the Petition, with respect to the proper time for appeal to the Courts in a situation where reconsideration is not completed within the sixty-day period now usually allowed between the date of decision and the effective date of a new certificate. (This period, it should be noted, coincides exactly with the period allowed in the Statute for taking appeals from a final CAB order, Section 1006(a) of the Federal Aviation Act, 72 Stat. 795, 49 U.S.C. 46(a).

Indeed, in this case, in the very same order in which the Board refused to stay the effective date of Delta's certificate, it *did* extend the effective date of a new certificate granted to another carrier because in that one instance it found that a petition for reconsideration had raised a point sufficiently valid to perhaps require revision of the certificate (Order E-13211, J.A. 1471a, 1494a, and 1496a). No such finding was made in the case of Delta's certificate.

Clearly, "hasty reconsideration" need not result from the decision below. A former chairman of the CAB has pointed out that the view of the law properly applied by the Second Circuit "does not mean frustration of the Board's ability to reconsider its decisions in certificate cases," Ryan, *Revocation of an Airline Certificate, supra,* 15 Journal of Air Law and Commerce, at 389.

The Board also complains that further stay of a certificate's effective date might in some cases disable the Board from authorizing needed services while petitions for reconsideration are pending (Petition, p. 11). This reliance upon the need for hasty implementation of newly-granted authority is specious. In this case, for example, the administrative proceeding commenced on May 25, 1955 (J.A. 1a). The CAB took three years and four months to reach a decision (on September 30, 1958, J.A. 1313a). Surely, an additional short delay to permit reconsideration, if the Board had seriously intended to reconsider Delta's certificate, would not have been crucial after all that time. *Furthermore, the Board can stay only a portion of a new award, if it desires to put uncontested portions into effect while giving more thought to those parts concerning which reconsideration has been sought* (see the CAB's invitation to Eastern Air Lines, Inc., in this very case, Order E-13211, J.A. 1494a).

CONCLUSION

This Brief in Opposition has shown that no substantial reason has been presented by the CAB for review of the decision below. That decision properly construes the provisions of the Federal Aviation Act. It is consistent with, and follows, a long line of decisions by this Court, by other Courts of Appeals, and by administrative agencies —including decisions by the CAB itself prior to the proceeding here involved. The decision below in no manner will impair or impede the administrative process. It merely requires compliance by an agency with the limitations imposed upon it by Congress when Congress created the agency.

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue in No. 492.

Respectfully submitted,

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APPENDIX A

Statutes and Regulations Involved

I. *Federal Aviation Act of 1958*, 72 Stat. 737 *et seq.*, 49 U.S.C. 1301 *et seq.*

A. *Section 204(a)*

GENERAL AUTHORITY

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act."

(72 Stat. 743, 49 U.S.C. 1324[a])

B. *Section 401(f)*

EFFECTIVE DATE AND DURATION OF CERTIFICATE

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided . . ."

(72 Stat. 754, 49 U.S.C. 1371[f])

C. *Section 401(g)*

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public con-

venience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

(72 Stat. 754, 49 U.S.C. 1371[g])

D. *Section 1005(d)*

SUSPENSION OR MODIFICATION OF ORDER

"Except as otherwise provided in this Act, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper."

(72 Stat. 794, 49 U.S.C. 1485[d])

E. *Section 1005(e)*

COMPLIANCE WITH ORDER REQUIRED

"It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the . . . Board under this Act affecting such persons so long as the same shall remain in effect."

(72 Stat. 794, 49 U.S.C. 1485[e])

II. *Interstate Commerce Act*, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*

A. *Sections 17(6), 17(7) and 17(8)*

REHEARING, REARGUMENT, OR RECONSIDERATION OF DECISIONS, ORDERS AND REQUIREMENTS

"(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for reconsideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this

paragraph, any application for rehearing, reargument or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing."

REVERSAL OR MODIFICATION AFTER REHEARING, ETC.

"(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order."

STAY OF DECISIONS, ETC., NOT EFFECTIVE AT TIME OF APPLICATION FOR REHEARING, ETC.

"(8) Where application for rehearing, reargument, or reconsideration of a decision, order or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision,

order, or requirement has not yet become effective, the decision, order or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division, but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

(24 Stat. 385, as amended, 49 U.S.C. 17(6), (7) and (8)).

III. *Motor Carrier Act* (Part II of Interstate Commerce Act), 49 Stat. 543, as amended, 49 U.S.C. 301 *et seq.*

A. *Section 212(a)*

SUSPENSION, CHANGE, REVOCATION AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: . . ."

(49 Stat. 555, as amended, 49 U.S.C. 312[a])

IV. *Water Carrier Act* (Part III of Interstate Commerce Act), 54 Stat. 929, 49 U.S.C.A. 901 *et seq.*

A. *Section 316(a)*

"The provisions of section 17 . . . of this title shall apply with full force and effect in the administration and enforcement of this chapter."

(54 Stat. 946, 49 U.S.C. 916[a])

V. *Regulations of the Civil Aeronautics Board,* 14 C.F.R. 302.1 *et seq.*

A. *Rule 37*

"(a) *Time for Filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within twenty (20) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. . . ."

(14 C.F.R. 302.37)